IN THE

Supreme Court of the United States

OCTOBER TERM, [redacted] 1970

No. [redacted] 304

JOHN S. BAK AND A 1964 CADILLAC,
Petitioners,

vs.

PEOPLE OF THE STATE OF ILLINOIS,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

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Now come the petitioners by their attorneys, Benjamin S. Adamowski, Paul D. Newey, Robert E. Adamowski, Francis X. Riley and Edmund W. Kitch, who pray that this court issue its Writ of Certiorari to the Supreme Court of Illinois to review the final order of that court, and allege as follows:

OPINIONS.

People v. *Bak;* Illinois Supreme Court Docket No. 41151 and *People of the State of Illinois ex rel. Stamos* v. *1964 Cadillac, etc.*, No. 41315, consolidated, are the cases in issue here. The opinions have not been reported. They appear in full in the Appendix (A and B).

JURISDICTION.

1. The final order was entered on March 24, 1970, on rehearing.

2. Jurisdiction of this Court is invoked to review that final order pursuant to § 1257(3) of the Judicial Code (28 U. S. C. § 1257(3)).

QUESTION PRESENTED FOR REVIEW.

Does a defendant have a Constitutional right to suppress evidence seized from him under the authority of a warrant obtained by means of a false and misleading affidavit?

CONSTITUTIONAL PROVISIONS INVOLVED.

The constitutional Provision involved in this case is Section one of the Fourteenth Amendment to the Constitution of the United States of America which provides:

> "SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE.

On April 25, 1967 John S. Bak was stopped in his car near the intersection of Grove and Western Avenues in the city of Blue Island by Officer Donald Konley of the Vice Control Division of the Cook County Sheriff's Police.

(R. 56, 80.)[1] Officer Konley proceeded to search John Bak's car under the authority of a warrant whose legality is in issue here. (R. 32.) In the course of the search Officer Konley found certain documents which indicated that John Bak was participating in an illegal gambling operation. (*Id.*) He arrested Bak. (R. 80.)

Two actions based on the incriminating documents were commenced by the State of Illinois. (R. C1, T. 35.) One, a criminal action, was brought against Bak for violation of the state gambling statute. Bak was convicted and fined $250.00. (R. 88, 91.) The second was a civil action brought for a forfeiture of Bak's vehicle because of its use in gambling. His car was ordered forfeited and sold. (T. C5-7.) Both decisions were appealed to the Illinois Supreme Court. (R. C40; T. C8.) They were there consolidated for decision. In its original opinion the Court reversed both decisions. (See Appendix A, *infra*, pp. A1-17.) Upon rehearing, it affirmed. (See Appendix B, *infra*, pp. A18-30.)

In both the criminal and civil actions a written motion to suppress the state's evidence was made on the ground that the warrant which authorized the search was invalid. (R. C15-16; T. C10-11.)[2] The defense argued that since the affidavit on which the magistrate based his determination of probable cause contained false, misleading and perjured information the magistrate had been deprived of an opportunity to make an independent determination of probable cause. (R. 21-22; T. 34-80.) Both trial courts rejected this argument (R. 50-51; T. C5-6.) In the criminal action the defendant was not permitted to introduce his proof that the affidavit was false and misleading because the trial

1. The "R" references are to the record in case No. 41151. The "T" references are to the record in case No. 41315.

2. The motion was authorized by, and filed in the language of, the statute. (Ill. Rev. Stat. 1967, ch. 38, par. 114-11.)

court held such evidence irrelevant. In the civil action the defendant was permitted to introduce his evidence but his motion to suppress failed for the same reason. The Illinois Supreme Court on rehearing affirmed on the ground that a defendant cannot introduce evidence to impeach the validity of an affidavit for a search warrant which appears sufficient on its face. (App. B, pp. A22-23.)

The content of the affidavit and the proof offered by the defendant were accurately summarized by the Illinois Supreme Court in the following words:

> "The complaint was filed by a police officer seeking a warrant to search the person of the defendant and his auto, which was specifically described. The auto was described as registered in the name of the defendant at the address of a tavern called The Pub. The objects to be sought under the warrant were particularly described. The affidavit given by the officer further recited that a reliable informant had given him information that horse-race gambling was taking place at the Pub; that the informant had given reliable information on two previous occasions; that the informant had placed bets at the Pub in a rear room screened from the tavern area by a wall of beer cases. The affiant further declared that on two occasions he had personally observed a number of persons walk behind the wall of beer cases and leave from the rear door; that on another occasion he had observed a person reading a racing form in the tavern and after making notes the person walked to the rear and then out of the rear door; that he had seen the informant do likewise and that the informant later told the affiant that he had placed a bet in the rear of the tavern. The affiant recited also that the informant declared that the defendant was the person who picked up bets from the tavern and that the auto described was used for this purpose.
>
> On a motion to suppress and again at trial the de-

fendant requested a hearing for the purpose of proving that the informer was not reliable and that other allegations made by the affiant were not true. He offered to prove that on the two instances cited in the affidavit in support of the reliability of the informer arrests resulted but not convictions; that the affidavit had misrepresented the physical appearance of the tavern, which misrepresentations could be proved by photographs and witnesses; that there was no rear room to the tavern but there was another entrance to the tavern from another street, which entrance was not visible from the part of the bar from which the affiant had made his observations; that the informer had never had any contact with the defendant or his car; and, finally, that the only paragraph mentioning the defendant was the last one in the complaint, which obviously had been typed on a different typewriter, and which may have been added after the execution of the search warrant." (App. B, pp. A18-19.)

In the civil forfeiture trial the defendant was permitted to introduce evidence proving that of the two arrests produced by information previously provided by the informer, one had resulted in an acquittal and the other was still pending for trial at the time of the civil trial below. (T. 13.) Testimony and photographs showed that the "rear" of the Pub was not a semi-private area hidden from public view but was instead located next to a frequently used public entrance on Rexford Street. (T. 14-15.) Testimony and photographs also showed that it was impossible to see persons entering and leaving through that door or the tables located on the north wall from the bar, as claimed in the affidavit. (T. 111-121.)

ARGUMENT

The petition for a writ of certiorari should be granted in this case for three reasons:

1. The question presented is one of vital importance for the daily dispatch of motions to suppress evidence illegally seized by the trial courts, who are without definitive procedural guidance. This Court noted in *Rugendorf v. United States*, 376 U. S. 528 (1964), that it "has never passed directly on the extent to which a court may permit. . . examination [of the validity of the search warrant] when the search warrant is valid on its face and when the allegations of the underlying affidavit establish 'probable cause' ". 376 U. S. at 531-32.

In *Rugendorf* itself, however the Court proceeded to consider such a challenge, holding the defendant's showing insufficient because the factual inaccuracies relied on "were of only peripheral relevancy to the showing of probable cause; and, not being within the personal knowledge of the affiant, did not go to the integrity of the affidavit." 376 U. S. at 532.

State authority established prior to the decision in *Mapp v. Ohio*, 367 U. S. 643 (1961) and collected in the Annotation, 5 A. L. R. 2d 394 (1949), generally barred such a challenge, and therefore provided no guidance as to its appropriate scope. Two recent state decisions have, in the absence of clear federal authority, followed these decisions. *Tucker v. State*, 244 MD. 488, 224 A. 2d 111 (1966), *cert. den.* 386 U. S. 1024 (1966) and the decision of the court below. Two other state courts have recently abandoned this rule, one in light of *Mapp*, *People v. Alfinito*, 16 N. Y. 2d 181 (1965); the other apparently in the hope that additional evidence adduced at the hearing can be used to remedy an affidavit inadequate under the standards of

Aguilar v. *Texas*, 378 U. S. 108 (1964). *O'Bean* v. *State*, 184 So. 2d 635 (1966, Miss.).

The federal courts have generally recognized that some such right exists, either under Rule 41 (e) of the Federal Rules of Criminal Procedure or under the constitution, but have been unclear as to its scope. "When, if ever, and to what extent a defendant can test the truth of assertion in an affidavit submitted to obtain a search warrant are difficult questions. . . . [W]e need not wrestle with these basic questions here." *United States* v. *Suarez*, 380 F. 2d 713 (2d Cir. 1967). The boldest stand has been taken by the United States Court of Appeals for the Seventh Circuit which has said, without discussion, that "if the hearing [on the motion to suppress] discloses matters which discredit or impeach the assertions in an affidavit, these must be considered by the trial court in determining whether probable cause in fact existed." *United States* v. *Roth*, 391 F. 2d 507, 509 (1967), holding that where the affiant's testimony on the motion to suppress contradicts his affidavit and the version presented in his testimony would not support probable cause, the evidence must be suppressed. See also, *United States* v. *Pearce*, 275 F. 2d 318, 322 (7th Cir., 1960): "That such a hearing was proper is hardly open to question."

The most extensive efforts to assay the procedural difficulties are the opinions in *United States* v. *Halsey*, 257 F. Supp. 1002 (S. D. N. Y. 1966) and *People* v. *Alfinito*, 16 N. Y. 2d 181 (1965). In *Halsey*, District Judge Frankel held that "Until or unless the defendant has at least made some initial showing of some potential infirmities he proposes to demonstrate, the magistrate's acceptance of the affidavit as truthful should be enough." 257 F. Supp. 1005. (See, Judge Frankel's extensive and thoughtful discussion of the problems involved at 257 F. Supp. 1005-06.) In

People v. *Alfinito*, 16 N. Y. 2d 181 (1965), the New York Court of Appeals fashioned a statute-based rule:

> "We hold as follows: first, that section 813-c of the Code of Criminal Procedure is to be construed so as to permit an inquiry as to whether the affidavit's statements were perjurious; second, that the burden of proof is on the person attacking the warrant . . . [cite], and third, that any fair doubt arising from the testimony at the suppressal hearing as to whether the affidavit's allegations were perjurious should be resolved in favor of the warrant since those allegations have already been examined by a judicial officer in issuing a warrant." 16 N. Y. 2d at 186.

In reaching this holding, the Court of Appeals noted that:

> "Modern thought which produced the decision in *Mapp* v. *Ohio* (367 U. S. 643) would make incongruous any holding that a search warrant is beyond attack even on proof that the allegations on which it was based were perjured. Our duty is to fashion a rule which will prevent such a violation of the citizen's rights and at the same time avoid creating a situation where overstrict rules would invalidate numerous warrants simply because witnesses can later be found to swear to the opposite of what the officer swore when he procured the warrant." 16 N. Y. 2d 185-186.

This Court, in the line of decisions running from *Aguilar* v. *Texas*, *supra*, to *Spinelli* v. *United States*, 393 U. S. 410 (1969), has extensively considered the question of what statements in an affidavit are sufficient to support a magistrate's determination of probable cause. These decisions, which have been confined to challenges to the adequacy of the form of the affidavit alone, have a technical complexity not altogether unlike that of common law pleading. They are designed to insure that information sufficient to support an independent determination has been provided to the magistrate.

The defense in this case had a plausible argument for the insufficiency of the form of the affidavit. The affidavit in no way indicated how the informer came to know, or could have known, that John S. Bak was the party who picked up bets at the Pub.[3] The affidavit only indicated that the informer had placed bets at the pub. The state, however, had an argument to counter this position. The informant had shown himself reliable by providing information leading to two arrests and by providing information that gambling was taking place at the Pub, information said to be verified by Officer Konley's personal observation. *Ergo*, since the informant had proven himself reliable, it was reasonable to rely on his statement that Bak was picking up the bets without any inquiry as to what basis—hearsay or otherwise—the informant had to connect Bak to the operation.

Refusing to contest this technical and formal issue, the defense attempted to focus on what, from a common sense point of view, would seem to be closer to the heart of the matter. It was physically impossible for Officer Konley to have seen what Officer Konley swore he had seen. (T. 111-113.) Therefore, he could not have personally verified the reliability of his informer. In any case, the area where the alleged gambling was taking place was not located in the "rear" in the usual sense of that term, but immediately adjacent to a frequently used public entrance, a highly unlikely location for an illegal gambling operation. (T. 119.) Since the facts in the affidavit sworn to by Officer Konley as within his own knowledge were false and misleading, and since the prior information provided by the informant had led only to arrests, not convictions, there was no basis to credit the reliability of the informer. It

3. See text of affidavit. Appendix C, p. A31. The Record (R. C 32-34) reveals the alteration of the affidavit in the final paragraph referring to the defendant, Bak.

was not even necessary to go into the question of whether the affidavit had to disclose to the magistrate how the informer linked Bak to the operation. This direct approach to the issue of probable cause has been foreclosed by the decision of the Court below.

This court's extensive consideration of the issue of what must be contained in an affidavit in the line of cases running from *Aguilar* to *Spinelli* has been premised on the assumption that the facts contained in the affidavit are true. If the insertion of false statements in the affidavit cannot be challenged on a motion to suppress, then these earlier decisions are merely guides to the police officer who desires to conduct an unconstitutional search as to the form his perjury must take to defeat a motion to suppress.

2. The record in this case presents a rich factual context for the court's consideration of the appropriate scope of a motion to suppress. The assertion of the defendant in these cases that the affidavit contained false and misleading statements is not simply a generalized accusation unsupported by the record. In the criminal case, the defendant's position is supported by concrete offers of proof that the affidavit was false and misleading in specific respects. In the civil case, the false and misleading aspects of the affidavit were actually proven by means of pictures and witnesses. Unlike *Tucker* v. *State*, 244 Md. 488, 224 A. 2d 111 (1966), where this Court denied certiorari, 386 U. S. 1024, this defendant offered presuasive evidence of the falsity of the affidavit, rather than merely general allegations of "bad blood". See, 224 A. 2d at 117.

The evidence of the defendant was offered to show that the affidavit was invalid in several different respects. Each of these types of evidence may require somewhat different treatment under appropriate procedures. The

diversity of the evidence offered here will enable the Court to consider the full range of problems in a concrete and partially proven factual context.

The types of evidence offered were:

a. Evidence to show that the affidavit itself had been altered after its presentation to the magistrate. The final sentence of the affidavit linking the defendant to the alleged gambling at the Pub was typed on a different machine, suggesting that it had been added to the affidavit later. (R. C. 34; R. 23.)

b. Evidence to show that the matters sworn to by the affiant as within his own knowledge were false because they did not occur and because the manner and conditions of observation set forth in the affidavit were contrary to the physical facts. (T. 111-113.)

c. Evidence to show that the informant was in fact unreliable because the one arrest resulting from his information that had come to trial at the time of the hearing below in the civil case had resulted in an acquittal. (T. 13.)

d. Evidence to show that the information provided by the informant was in fact false because gambling did not take place in the Pub. (T. 121, 125.)

3. The decision of the court below undermines the constitutional protection afforded citizens of the United States against unreasonable searches and seizures. The Court below held that the right of citizens to be protected against unreasonable searches and seizures is sufficiently protected by the possibility of a perjury prosecution for a false affidavit. Therefore, reasoned the court, there is no reason to permit defendant to challenge the truth of an affidavit on a motion to suppress. Similar arguments were made in *Mapp* v. *Ohio*, 367 U. S. 643 (1961) that the threat

of disciplinary, civil and criminal actions were sufficient protection for the citizenry against unreasonable searches and seizures. This Court rejected that argument in *Mapp*. Given the difficult requirements of proof in a perjury case, and given the privilege of the police officer affiant not to disclose the name of his informer, *McCray* v. *Illinois*, 386 U. S. 300 (1967), the possibility of a perjury prosecution seems weak protection indeed. Mr. Justice Schaeffer, dissenting below, eloquently said:[4]

> "The fourth amendment to the constitution of the United States provides that no Warrants shall issue, but upon probable cause, supported by Oath or affirmation. Section 6 of article II of the constitution of Illinois contains a similar prohibition. The basic question in these cases is whether those constitutional provisions can be interpreted to mean that the existence of the facts relied upon to establish probable cause cannot be controverted once the warrant has issued. If there can be no subsequent inquiry into the truth of those facts, the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, is protected only by an unreviewable *ex parte* determination of the lowest officer in the judicial hierarchy. And that determination may be based upon a hearsay report of the statements of an anonymous informer, which would be inadmissible in any judicial proceeding. I cannot bring myself to believe that this is the probable cause, supported by Oath required by the fourth amendment.
>
> One of the difficulties in dealing with this area of the law is that most of the cases with which the courts are concerned involve illegal possession of gambling equipment or narcotics, and the result of the search makes guilt unmistakable. The courts have no way of knowing how many unproductive searches are made upon the basis of false affidavits because those cases

4. Appendix D, *infra*, pp. A26-27. The text of this dissent appears in *People* v. *Mitchell*, No. 41463, March Term, 1970, *infra*, pp. 26-30. Reportedly that case is pending here on a Petition for *Certiorari*.

do not come before the courts. The constitutional requirement of an oath would seem to imply a remedy, either by civil action or by prejury prosecution, for the victim of a search based upon a false affidavit, but the conclusion of the majority in *McCray* v. *Illinois* (1967), 386 U. S. 300, 18 L. Ed. 2d 62, 87 S. Ct. 1056, seems to have eliminated any remedy.

In an atmosphere in which there is widespread concern about narcotics problems it is difficult for a court to enforce constitutional guarantees at the instance of one who is unquestionably guilty. But the constitutional provisions are directed at potential abuses by a tyrannical government and those provisions should not, in my opinion, be so diluted in order to secure convictions in narcotics and gambling cases that they can no longer afford protection against the operations of a Hitler type goverment. It may be that the constitutional protection is phrased in terms that are considered too sweeping to meet the needs of society today. If so, they should be amended. But it is the responsibility of a court to interpret and apply the constitutional provisions as they exist."

CONCLUSION.

WHEREFORE, the petitioners pray that this petition for a writ of certiorari be granted.

Respectfully submitted,

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APPENDIX A.

Docket Nos. 41151 and 41315 cons.—Agenda 4—[5] January, 1969.

THE PEOPLE OF THE STATE OF ILLINOIS, Appellee, *vs.* JOHN S. BAK, Appellant.—*In re* PEOPLE *ex rel.* JOHN J. STAMOS, Appellee, *vs.* 1964 CADILLAC, Appellant.

Mr. JUSTICE KLINGBIEL delivered the opinion of the court:

Defendant, John S. Bak, was convicted of gambling in the circuit court of Cook County and fined $250. In a companion case his automobile was declared forfeited and ordered sold for having been used by defendant in the commission of the gambling offense. The two cases have been consolidated for appeal, and the sole question involved is the extent of the constitutional right of defendant to contest the validity of the search warrant leading to his arrest and the seizure of his automobile.

The complaint was filed by a policeman seeking a warrant to search the person of defendant and his car which was specifically described and registered to defendant at a certain tavern known as The Pub. The objects to be seized were particularly described. The affidavit further recited that a reliable informant gave the affiant information relative to horse-race gambling taking place at the Pub; that the informant had given reliable information on two previous occasions; that informant had placed bets at the Pub in a rear room screened from the tavern proper by a wall of beer cases. Affiant further stated that on two occasions he

5. This opinion was withdrawn and replaced by the opinion of March 24, 1970, upon rehearing. Appendix B, pp. A18-30.

personally observed a number of persons walk behind the wall of beer cases and leave from the rear door; that on another occasion he observed a person reading a racing form in the tavern and after making notes he walked to the rear and out the rear door; that he saw informant do likewise and later informant told him he had placed a bet. The last sentence of the affidavit recited that the informant stated that defendant was the party who picked up the bets and that the car mentioned was the one he uses.

On motion to suppress and again at the trial defendant requested a hearing for the purpose of proving that the informer was not reliable and that other allegations of the affiant were not true. He offered to prove that on the two instances cited in the affidavit in support of the reliability of the informer arrests resulted but no convictions; that affiant had misrepresented the physical appearance of the tavern which could be proved by pictures and witnesses; that there was no rear room but rather another entrance to another street which entrance was not visible from the bar from where affiant said he observed people entering and leaving said entrance; that the informer never had any contact with the defendant and his car; and finally, that the only paragraph mentioning defendant was the last one in the complaint which obviously was typed by a different typewriter and may have been added after the execution of the warrant.

The trial court denied the motion to suppress and the right to a hearing on the grounds that the warrant was sufficient on its face and defendant was not entitled to a hearing to look behind the warrant and affidavit. Defendant did not testify at the trial and the State proved that after serving the warrant defendant was arrested in his car and gambling paraphernalia was found on his person and in his car. Later in the forfeiture trial the motion to suppress was

again denied although some of the evidence offered by defendant was heard by the court.

Defendant contends that he has a constitutional right to look behind a search warrant which is valid on its face and to present evidence challenging the truthfulness of the allegations of fact on which the warrant was issued. The State contends that the issuance of a warrant is a conclusive judicial finding of the existence of probable cause and any subsequent hearing is limited to an examination of the face of the complaint and warrant.

The question posed is a difficult one which in Illinois has not been fully discussed or explicitly decided. In other States and in the Federal courts the decisions are in conflict, both points of view being represented (See 5 A. L. R. 2d 394.) The answer lies in an analysis of the constitutional right itself, a restatement of the meaning of probable cause and an understanding that the existence of probable cause is a judicial determination.

The fourth amendment to the constitution of the United States and section 6 of article II of the Illinois constitution are practically identical in prohibiting unreasonable searches and seizures and providing that no warrant shall issue without probable cause, supported by affidavit, particularly describing the place to be searched, and the persons or things to be seized. Likewise the standards for issuance of warrants are the same for both Federal and State authorities. (*Aguilar* v. *Texas*, 378 U. S. 108, 12 L. Ed. 2d 723, 84 S. Ct. 1509.) And we have held that the two constitutional provisions are to be construed alike. *People* v. *Grod*, 385 Ill. 584.

Probable cause is defined as having information which would justify a reasonably prudent person in believing that a crime has been or is being committed, and that evidence thereof is contained on the premises. The substance

of the definition is a reasonable ground for belief in guilt, *i.e.* whether the facts and circumstances within the knowledge of the affiant, and of which he had reasonably trustworthy information, were sufficient in themselves to warrant a man of reasonable caution in the belief that the law was being violated. *Carroll* v. *United States*, 267 U. S. 132, 69 L. Ed. 543, 45 S. Ct. 280.

As is apparent from the definition it is the judgment of the issuing magistrate, not that of the affiant, that is controlling. As stated in *Johnson* v. *United States*, 333 U. S. 10, 92 L. Ed. 436, 68 S. Ct. 367, the protection of the constitutional provision lies in the requirement that the conclusions and inferences arising from the allegations of the affiant are to be made "by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferretting out crime." Though the affidavit may be based upon hearsay from an informer, nonetheless, to enable a magistrate to make this judgment it necessarily follows that he must be furnished with some of the underlying circumstances upon which the affiant based his allegations concerning the reliability of the informer; otherwise the function of the magistrate would be that of a mere rubber stamp for the affiant. (*Aguilar* v. *Texas*, 378 U. S. 108, 12 L. Ed. 2d 723, 84 S. Ct. 1509.) If the allegations are based on personal observation it must be so stated with the time and place specifically set forth and the issuing magistrate must assess independently the claimed showing of probable cause that is brought before him. *Giordenello* v. *United States*, 357 U. S. 480, 2 L. Ed. 2d 1503, 78 S. Ct. 1245.

From these rules it follows logically that a factual showing sufficient to support a finding of probable cause by a magistrate must be a truthful showing. To hold otherwise would be incongruous, for untruths are not facts. To deny a defendant the right to disclose prejury or misrepresenta-

tion would not only deprive him of his constitutional right but in effect it would make a mockery of the very procedure established to protect that right.

This right to a hearing, under appropriate circumstances, has been determined by recent decisions in the Federal courts. The Supreme Court in *Rugendorf* v. *United States*, 376 U. S. 528, 11 L. Ed. 2d 887, 84 S. Ct. 825, stated that it has never passed directly on the extent to which a court may permit such an examination. However, it did not dispute, or at least it left open, the question of under what circumstances the right might be exercised, stating that the facts then before it were "of only peripheral relevance to the showing of probable cause, and * * * did not go to the integrity of the affidavit." In *United States* v. *Gillette* (2d cir.), 383 F. 2d 843, the court stated that "in appropriate circumstances, a hearing should be held to establish the veracity of sworn allegations in an affidavit which is adequate on its face." To like effect is *United States* v. *Suarez* (2d cir.), 380 F. 2d 713, wherein the court stated that it may be that testimony at trial could so clearly demolish statements in an affidavit supporting the warrant, that a prior denial of a motion to suppress would be overridden. In *Gillette* it was held that the issue had not been properly raised by defendant's attorney and there was no factual issue to be resolved. In *Suarz* defendant failed to request a hearing and even so the court found that evidence was properly heard though it fell far short of controverting statements in the affidavit. In *Chin Kay* v. *United States* (4th cir.), 311 F. 2d 398, it was acknowledged that under proper circumstances a defendant may be able to challenge the veracity of recitals of "previous reliability" by a motion to suppress. In *King* v. *United States* (4th cir.), 282 F. 2d 398, the court stated that at least in Federal courts the rule is that false information given by the affiant will vitiate the warrant and search. In *United States* v. *Pearce* (7th cir.),

275 F. 2d 318, the lower court heard extensive evidence on the question whether affiant had personal knowledge of the matters alleged in the affidavit, and on appeal it was held that the propriety of such a hearing was hardly open to question. In *United States* v. *Roth* (7th cir. 1967), 391 F. 2d 507, 509, the court held that a trial court may not use evidence adduced at a subsequent hearing on a motion to suppress to validate an otherwise defective affidavit. "But if the hearing discloses matters which discredit or impeach the assertions in the affidavit, these must be considered by the trial court in determining whether probable cause in fact existed."

Other cases have considered the circumstances and conditions under which a defendant should be entitled to a hearing. In *People* v. *Alfinito*, 16 N. Y. 2d 181, 211 N. E. 2d 644, the affidavit alleged that an informant had placed bets with defendant and that the police officer (affiant) had personally observed defendant at the same premises exchanging slips of paper and money with a number of persons. At the hearing on the motion to suppress, defendant's wife and another witness testified that defendant was not present at the apartment on any of the occasions mentioned in the affidavit. After a hearing the lower court granted the motion, stating that the sharp conflict in the testimony created a doubt which must be resolved in favor of defendant. The appellate court recognized the right of the defendant to question the veracity of the affiant, stating that, "Modern thought which produced the decision in *Mapp* v. *Ohio*, 367 U. S. 643, [6 L. Ed. 2d 1081,] 81 S. Ct. 1684, would make incongruous any holding that a search warrant is beyond attack even on proof that the allegations on which it was based were perjured." The court then expressly rejected the import of the lower court's ruling that whenever there is sworn testimony disputing the basic allegations of the affidavit the warrant must be quashed. Instead it endeavored to establish a rule which would prevent such a violation of a person's rights

and at the same time avoid creating a situation where over-strict rules would invalidate numerous warrants simply because witnesses could later be found to swear to the opposite of what the officer swore when he procured the warrant. It concluded that an inquiry as to the truthfulness of affiant should be permitted, that the burden of proof was on the person attacking the warrant and that any fair doubt arising from the testimony as to truthfulness of affiant's allegations should be resolved in favor of the warrant since those allegations have already been examined by a judicial officer in issuing the warrant.

In *United States* v. *Halsey* (S. D. N. Y.), 257 F. Supp. 1002, the court reviewed the question at length and approved the rule in *Alfinito*, but only "where there is an initial showing of some sort—some suggestion of a basis or area of doubt—is tendered." It emphasized, however, that as in the case under consideration, a defendant is not entitled to a hearing on a "mere bland and sweeping claim for a right to try affiant in every case, with no foundation beyond the hope that some inaccuracy or falsehood may emerge."

In *O'Bean* v. *State* (Miss.), 184 So. 2d 635, it was held that the mere issuance of a warrant does not constitute such a conclusive judicial finding of probable cause so as to preclude further inquiry pursuant to appropriate pleading; and a previous decision to the contrary was expressly overruled.

In California a similar result is reached based on the Penal Code which provides for a hearing if grounds for the issuance of the warrant are controverted. (*People* v. *Butler*, 415 P. 2d 819, 52 Cal. Rptr. 4.) Our Code of Criminal Procedure (Ill. Rev. Stat., 1967, ch. 38, par. 114—12(b)), likewise sets forth the procedure to be followed in seeking a suppression of unlawfully obtained evidence: "The motion shall be in writing and state facts showing

wherein the search and seizure were unlawful. The judge shall receive evidence on any issue of fact necessary to determine the motion and the burden of proving that the search and seizure were unlawful shall be on the defendant."

We agree with the principles contained in the cases above cited and we conclude that the circumstances presented by the facts before us entitle defendant to a hearing for the purpose of controverting the allegations of the affidavit. We likewise find that the section of the Code of Criminal Procedure above quoted contemplates such a hearing where the truth of the allegations supporting the warrant are seriously challenged. As stated in *United States* v. *Halsey*, 257 F. Supp. 1002, we do not intend that our decision here shall be authority for an indiscriminate or blind attack upon every affidavit in the hope that some inaccuracy may be revealed. Rather, we hold that a challenge to the truthfulness of the allegations of an affidavit supporting a warrant raises an issue of fact necessary to be determined in a hearing for that purpose, when appropriately pleaded with an offer of proof warranting a reasonable conclusion that the challenge has merit.

The State has cited *People* v. *Alvis*, 342 Ill. 460, as authority for the proposition that a warrant valid on its face may not be challenged by extraneous evidence. We believe that the facts in the case before us are distinguishable, but to the extent that they are not that decision is expressly overruled.

We therefore conclude that case No. 41151 involving the gambling charge against defendant, John S. Bak, and case No. 41315 involving the forfeiture of defendant's automobile are both reversed and the causes remanded for new trials, with directions that a hearing first be held on defendant's motion to suppress.

Reversed and remanded, with directions.

Mr. JUSTICE HOUSE, dissenting:

It is not entirely clear whether the holding in the majority opinion is based on a right it finds in the fourth amendment to the Federal constitution and section 6 of article II of our constitution or section 114—12(b) of the Code of Criminal Procedure. (Ill. Rev. Stat. 1967, ch. 38, par. 114—12.) In my opinion, however, a defendant has neither a constitutional nor a statutory right to go behind a search warrant which is valid on its face and is supported by an affidavit showing probable cause. That was the rule in this State prior to this decision (*People* v. *Alvis*, 342 Ill. 460), and is the rule in most jurisdictions that have considered the question. See 5 A. L. R. 2d 394.

While not completely analogous, there are strong similarities between the presentment of an indictment by a grand jury and the issuance of a search warrant by a court. Both have a constitutional basis designed to protect the rights of our citizens against arbitrary and oppressive action by the government; both are *ex parte* proceedings; both the grand jury and court issuing a warrant may act on hearsay evidence and both act on probabilities which will later be tested for certainty—in the one case by a formal trial and in the other by execution of the warrant.

Although the Supreme Court has not decided whether, or the extent to which, a defendant may question the truthfulness of the allegations of an affidavit showing "probable cause" for the issuance of a search warrant (see *Rugendorf* v. *United States*, 376 U. S. 528, 11 L. Ed. 2d 887, 84 S. Ct. 825), it has decided that "An indictment returned by a legally constituted and unbiased grand jury, like an information drawn by the prosecutor, if valid on its face, is enough to call for trial of the charge on the merits" and defendants are not, therefore, entitled "to challenge indict-

ments on the ground that they are not supported by adequate or competent evidence." (*Costello* v. *United States*, 350 U. S. 359, 363-364, 100 L. Ed. 397, 402, 403, 76 S. Ct. 406, 409; see also *Lawn* v. *United States*, 355 U. S. 339, 2 L. Ed. 2d 321, 78 S. Ct. 311, and *United States* v. *Blue*, 384 U. S. 251, 16 L. Ed. 2d 510, 86 S. Ct. 1416, concerning illegally-obtained evidence before the grand jury.) Our court has followed this holding. *People* v. *Jones*, 19 Ill. 2d 37.

The policy considerations which militate against a defendant being able to challenge an indictment on the ground that it is not supported by adequate or competent evidence also militate against his disputing matters stated in an affidavit supporting a search warrant. That the right to controvert such an affidavit may deter illegal searches is not alone sufficient. The Supreme Court has pointed out that while the aim of the exclusionary rule is the deterrance of illegal searches, none of its decisions "hold that anything which deters illegal searches is thereby commanded by the Fourth Amendment." *Alderman* v. *United States*, ... U. S. ....., 22 L. Ed. 2d 176, 187, 89 S. Ct. 961, 967.

It would seem to me that if a defendant can be put in jeopardy and on trial for a felony without an opportunity to challenge the adequacy or competency of the evidence upon which the indictment is based; then a person or his premises may be searched pursuant to a warrant, valid on its face and supported by an affidavit showing probable cause, without an opportunity to dispute the matters stated in the affidavit. An adversary proceeding to determine whether there was in fact probable cause for the issuance of a search warrant is neither required or contemplated by the constitution.

The majority opinion states that recent Federal decisions support its position. The Federal cases cited stand simply

for the proposition that the question has not been decided. *Rugendorf* v. *United States*, 376 U. S. 528, 11 L. Ed. 2d 887, 84 S. Ct. 825, of course left the issue undecided.

United States v. *Gillette* (2d cir.) 383 F. 2d 843, is quoted by the majority as follows: "in appropriate circumstances, a hearing should be held to establish the veracity of sworn allegations in an affidavit which is adequate on its face." The fuller quote is "we by no means foreclose the possibility that, in appropriate circumstances, a hearing should be held to establish the veracity of sworn allegations in an affidavit which is adequate on its face. * * * The case at hand, however, does not present such circumstances." (383 F. 2d 843, 849.) The position taken by the court in *Gillette*, therefore, was simply that taken by the Supreme Court in *Rugendorf*. It left the issue undecided.

The majority also cites *United States* v. *Suarez* (2d cir.), 380 F. 2d 713, as standing for the proposition it attributes to *Gillette*. The court, however, in *Suarez* stated: "When, if ever, and to what extent a defendant can test the truth of assertions in an affidavit submitted to obtain a search warrant are difficult questions. They were specifically held open in *Rugendorf* v. *United States*, 376 U. S. at 531-532, 84 S. Ct. 825, 11 L. Ed. 2d 887, and have not been explicitly decided or fully discussed by this court." 380 F. 2d 713, 715.

My reading of the Federal cases is that none of them has squarely held that the allegations in an affidavit supporting a search warrant may be controverted. A reading of the State cases cited by the majority shows that none of them has held that a defendant has a constitutional right to controvert the allegations of a supporting affidavit.

O'Bean v. *State* (Miss.) 184 So. 2d 635, does, as the majority states, hold "That the mere issuance of a warrant does not constitute such a conclusive judicial finding of

probable cause or as to preclude further inquiry pursuant to appropriate pleading; and a previous decision to the contrary was expressly overruled." Citing this decision, however, for the proposition that the averments in an affidavit may be controverted is a complete misapprehension of the Mississippi case.

Prior to *O'Bean* the Mississippi rule was that the issuance of the warrant is a conclusive judicial finding of the magistrate of the existence of probable cause. The Mississippi court recognized, however, that after *Mapp* v. *Ohio*, 367 U. S. 643, 6 L. Ed. 2d 1081, 81 S. Ct. 1684, the rulings of the Supreme Court on search and seizure were applicable to the States. It also recognized that in *Aguilar* v. *State of Texas*, 378 U. S. 108, 12 L. Ed. 2d 723, 84 S. Ct. 1509, the Supreme Court held that on a motion to supress evidence, the affidavit in support of the warrant may be examined to see if it shows the existence of probable cause on its face. Thus, *O'Bean* only stands for the proposition that an affidavit in support of warrant must show probable cause on its face.

The New York case (*People* v. *Alfinito*, 16 N. Y. 2d 181, 211 N. E. 2d 644) and the California case (*People* v. *Butler*, 415 P. 2d 819, 52 Cal. Rptr. 4,) cited in the majority opinion both allow the avertments of the affidavit to be controverted as matter of statutory right under the particular wording of their respective statutes. In my opinion, however, our statute governing motions to suppress evidence does not give a defendant such a right.

Section 114—12 of the Code of Criminal Procedure (Ill. Rev. Stat. 1967, ch. 38, par. 114—12) authorizes a motion to suppress on the ground that "there was not probable cause for the issuance of the warrant" and provides that "The judge shall receive evidence on any issue of fact necessary to determine the motion * * *." The majority

feel that this authorizes an adversary proceeding to determine probable case. I cannot agree.

The trouble with this conclusion is that it assumes the very thing we are called upon to decide. If the allegations of an affidavit can be controverted, probable cause is an issue of fact and the defendant may introduce evidence on the issue; if, on the other hand, the allegations of an affidavit cannot be controverted, then probable cause is a question of law to be determined from the face of the affidavit and it is not necessary for the judge to receive evidence. Thus, simply because a motion to suppress evidence obtained with a warrant may be based on ground that "there was not probable cause for the issuance of the warrant" and the "judge shall receive evidence on any issue of fact" does not make the issue of probable cause a question of fact.

The committee comments to section 114—12 point out that "This section provides the pre-trial procedure for enforcing the constitutional protection against illegal searches and seizures as found in the Illinois Constitution, Art. II, Section 6, and the United States Constitution, 14th Amendment which applies to the states since *Mapp* v. *Ohio*." It is apparent, therefore, that our legislature did not intend to create any new statutory right but was merely providing the procedure for carrying out the constitutional right against unreasonable searches and seizures. The guide to interpeting this section is what is required by the constitution. My reading of the Federal cases and cases from other State jurisdictions fails to reveal where any of them has held that a defendant has a constitutional right to controvert the allegations of the affidavit; and if our statute was intended to create such a right, it is strange that the committee comments to section 114—12 failed to mention it and that none of the law review articles have mentioned it. See *e.g.*, La Fave, Search and Seizure: "The Course Of True Law * * * Has Not * * * Run Smooth," 1966 Ill. L.F. 255.

What makes this case even more perplexing is that it goes beyond all the cases it cites in support of the rule it lays down. The dicta from the Federal cases indicate that if the Federal courts were to apply such a rule, it would only be where the affiant had intentionally misled the magistrate into finding probable cause.

For example, the Supreme Court in *Rugendorf* stated: "This Court has never passed directly on the extent to which a court may permit such examination when the search warrant is valid on its face and when the allegations of the underlying affidavit established 'probable cause'; however, assuming, for the purpose of this decision, that such attack may be made, we are of the opinion that the search warrant here is valid. . . . The factual inaccuracies depended upon by petitioner to destroy probable cause * * * were of only peripheral relevancy to the showing of probable cause, and, not being within the personal knowledge of the affiant, did not go to the intergrity of the affidavit." (376 U. S. 528, 531-532, 11 L. Ed. 2d 887, 891, 84 S. Ct. 825, 827-828.) The court further stated: "Since the erroneous statements that petitioner was the manager of Rugendorf Brothers Meat Market and was associated with Leo in the meat business were not those of the affiant, they fail to show that the affiant was in bad faith or that he made any misrepresentations to the Commissioner in securing the warrant." (376 U. S. 528, 533, 11 L. Ed. 2d 887, 892, 84 S. Ct. 825, 828.

The New York Court in *Ulfaito* construed its statute in such a manner as to only allow the allegations of the affidavit to be controverted to show perjury of the affiant.

The majority does not limit the rule it lays down to a showing of perjury, bad faith or intentional misrepresentation by the affiant in securing the warrant, but it permits a full adversary proceeding when the truthfulness of the allegations in an affidavit is challenged.

The new rule announced by the majority leads me to the inescapable conclusion that Mr. Justice Black was correct when he said: "It is seemingly becoming more and more difficult to gain acceptance for the proposition that punishment of the guilty is desirable, other things being equal. One commentator, who attempted in vain to dissuade this Court from today's holding, thought it necessary to point out that there is 'a strong public interest in convicting the guilty.' Indeed the day may soon come when the ever-cautious law reviews will actually be forced to offer the timid and uncertain contention, recently suggested satirically, that 'crime may be thought socially undesirable, and its control a "valid governmental objective" to which the criminal law is "rationally related".' " *Kaufman* v. *United States*, ..., U. S. ....., 89 S. Ct. 1068, 1081 (dissenting).

Mr. Justice Underwood, also dissenting:

I concur with and join in Mr. Justice House's dissent.

The policy of the fourth amendment is to prohibit unreasonable intrusions into the privacy of the individual. Whether there existed a necessity for the intrusion has always been reviewable under the test of probable cause. Intrusions authorized by warrant have always been preferred to warrantless instrusions because "the informed and deliberate determinations of magistrates empowered to issue warrants * * * are to be preferred over the hurried action of officers * * * who may happen to make arrests." (*United States* v. *Lefkowitz*, 285 U. S. 452, 464, 76 L. Ed. 877, 882, 42 S. Ct. 420, 423.) It is not surprising then that courts have been prone to sustain searches made under the authority of a warrant even though a warrantless search based upon the same evidence would have been condemned. *United States* v. *Ventresca*, 380 U. S. 102, 13 L. Ed. 2d 684, 85 S. Ct. 741, 746; *Aguilar* v. *Texas*, 378 U. S. 108, 11-11, 12 L. Ed. 2d 723, 726, 84 S. Ct. 1509,

1512; *Jones* v. *United States*, 362 U. S. 257, 270, 4 L. Ed. 2d 697, 707, 80 S. Ct. 725, 735.

It is clear that the generally prevailing view has been, and was in this State prior to this opinion, that the sufficiency of a complaint for a search warrant was tested by its contents and those alone. The facts stated in the affidavit, together with such other evidence as might have been presented to the issuing judge, either were or were not sufficient to establish probable cause for the issuance of the warrant. In *Aguilar* (378 U. S. at 109 n. 1, 12 L. Ed. 2d at 725 n. 1, 84 S. Ct. at 1511 n. 1) the United States Supreme Court stated: "It is elementary that in passing on the validity of a warrant, the reviewing court may consider *only* information brought to the magistrate's attention," citing *Giordenello* v. *United States*, 357 U. S. 480, 2 L. Ed. 2d 1503, 78 S. Ct. 1245, wherein the court ignored evidence not brought to the attention of the magistrate issuing the warrant. (See *Spinelli* v. *United States*, ___ U. S. ___, 21 L. Ed. 2d 637, 89 S. Ct. 584, 587, n. 3.) In these cases the State has been precluded from presenting additional information to sustain a showing of probable cause.

Likewise the defendant has been precluded from attacking the veracity of the sworn allegations in an affidavit which is adequate on its face. *Kenney* v. *United States*, (D. C. cir.), 157 F. 2d 442; *United States* v. *Gianaris*, (D. Md. C.), 25 F. R. D. 194; *Tucker* v. *State*, 244 Md. 488, 224 A. 2d 111; *Mattingly* v. *Commonwealth*, 310 Ky. 561, 221 S. W. 2d 82; *Owens* v. *State*, 217 Tenn. 544, 399 S. W. 2d 507; *Hernandez* v. *State* (Tex. Crim. App.), 255 S. W. 2d 219; *Griffey* v. *State* (Tex. Crim. App.), 327 S. W. 2d 585; *cf. People* v. *Alvis*, 342 Ill. 460; *see, also, Anno.* 5 A. L. R. 2d 394.

The result of these rulings has been to limit the review of the reasonableness of the intrusion solely to a review of

the information as it was presented to the magistrate. If it was insufficient as presented to him, the State cannot cure this with additional information. If the information presented to him was sufficient to issue the warrant then, by definition, the intrusion pursuant to this warrant was not unreasonable for the credibility of the affiant is one of the ingredients of probable cause.

Safeguards exist against intentional misrepresentation by officers, for as recently as *People* v. *McGrain*, 38 Ill. 2d 189, 190—91, this court cited the rule that the information must contain enough detailed facts so that a lying affiant can be convicted of prejury.

As pointed out earlier, we are under no compulsion to make, as the majority opinion does, a major change in the law governing complaints for search warrants. The new rule is, in my judgment, a most undesirable one; it unnecessarily and further complicates the course of criminal litigation which is already becoming interminable in that there seems to be no point at which an obviously guilty defendant's conviction can be said to be final; it largely nullifies the policy heretofore prevailing in this and most other courts whereby law enforcement officers were encouraged to secure warrants as a prelude to a search, and its inevitable result will be a substantial reduction in the number of cases in which warrants are sought.

APPENDIX B.

Docket Nos. 41151, 41315 cons.—Agenda 67—November, 1969.

THE PEOPLE OF THE STATE OF ILLINOIS, Appellee, *vs.* JOHN S. BAK, Appellant.—THE PEOPLE *ex rel.* JOHN J. STAMOS, Appellee, *vs.* 1964 CADILLAC, Appellant.

PER CURIAM:[6] The defendant, John S. Bak, was convicted in the circuit court of Cook County of the crime of gambling and fined $250. His automobile was declared forfeited in a companion case and ordered sold because it had been used by him in the commission of the gambling offense. The cases have been consolidated for appeal. The question presented is whether the person against whom or against whose property a search warrant has been directed may dispute the matters declared under oath which led to the finding of probable cause and the issuance of a search warrant by the judicial officer.

The complaint was filed by a police officer seeking a warrant to search the person of the defendant and his auto, which was specifically described. The auto was described as registered in the name of the defendant at the address of a tavern called The Pub. The objects to be sought under the warrant were particularly described. The affidavit given by the officer further recited that a reliable informant had given him information that horse-race gambling was taking place at the Pub; that the informant had given reliable information on two previous occasions; that the informant had placed bets at the Pub in a rear room screened from

6. This opinion as originally issued was written by Justice Ward.

the tavern area by a wall of beer cases. The affiant further declared that on two occasions he had personally observed a number of persons walk behind the wall of beer cases and leave from the rear door; that on another occasion he had observed a person reading a racing form in the tavern and after making notes the person walked to the rear and then out of the rear door; that he had seen the informant do likewise and that the informant later told the affiant that he had placed a bet in the rear of the tavern. The affidavit recited also that the informant declared that the defendant was the person who picked up bets from the tavern and that the auto described was used for this purpose.

On a motion to suppress and again at trial the defendant requested a hearing for the purpose of proving that the informer was not reliable and that other allegations made by the affiant were not true. He offered to prove that on the two instances cited in the affidavit in support of the reliability of the informer arrests resulted but no convictions; that the affidavit had misrepresented the physical appearance of the tavern, which misrepresentations could be proved by photographs and witnesses; that there was no rear room to the tavern but there was another entrance to the tavern from another street, which entrance was not visible from the part of the bar from which the affiant had made his observations; that the informer never had any contact with the defendant or his car; and, finally, that the only paragraph mentioning the defendant was the last one in the complaint, which obviously had been typed on a different typewriter, and which may have been added after the execution of the search warrant.

The trial court held that the defendant did not have a right to a hearing because the warrant was sufficient on its face and that the defendant was not entitled to inquire behind the warrant and affidavit. The defendant did not testify at the trial and the State proved that after the war-

rant had been served the defendant had been arrested in his car and that gambling paraphernalia had been found on his person and in the auto. Later, in the forfeiture trial, another motion to suppress was denied, although some of the evidence offered there by the defendant was heard by the court.

The defendant contends that he has a constitutional right to look behind a search warrant which is valid on its face and to present evidence challenging the truthfulness of the allegations of fact on which the warrant was issued. The State contends that the issuance of a warrant represents a conclusive judicial finding of the existence of probable cause and that any subsequent hearing which may be ordered must be limited to an examination of the face of the complaint and warrant.

It would appear that a majority of the jurisdictions which have considered the question have concluded that matters alleged under oath, upon which a search warrant was issued, may not be disputed by the one against whom or against whose property the warrant has been directed. See, *Kenney* v. *United States* (D. C. cir.), 157 F. 2d 442; *United States* v. *Gianaris* (D. D. C.), 25 F. R. D. 194; *Tucker* v. *State*, 244 Md. 488, 224 A. 2d 111; *Mattingly* v. *Commonwealth*, 310 Ky. 561, 221 S. W. 2d 82; *Owens* v. *State*, 217 Tenn. 544, 399 S. W. 2d 507; *Hernandez* v. *State*, 158 Tex. Crim. 296, 255 S. W. 2d 219; *Griffey* v. *State*, 168 Tex. Crim. 338, 327 S. W. 2d 585; see, also, Annot. 5 A. L. R. 2d 394.

However, other courts either by holding or by suggestion have favored a contrary view. See, *United States* v. *Suarez* (2d cir.), 380 F. 2d 713; *United States* v. *Gillette* (2d cir.), 383 F. 2d 843; *United States* v. *Roth* (7th cir.), 391 F. 2d 507; *People* v. *Alfinito*, 16 N. Y. 2d 181, 211 N. E. 2d 644.

The Supreme Court has not yet ruled on the question. In *Rugendorf v. United States*, 376 U. S. 528, 11 L. Ed. 2d 887, 84 S. Ct. 825, the Court said (376 U. S. at 532, 11 L. Ed. 2d at 891): "Petitioner attacks the validity of the search warrant. This court has never passed directly on the extent to which a court may permit such examination when the search warrant is valid on its face and when the allegations of the underlying affidavit establish 'probable cause' * * *." This court has not directly considered the issue, but the appellee urges that we follow the majority view, which, it says, was implicitly approved in *People v. Alvis*, 342 Ill. 460, 462, and in *People v. Elmore*, 16 Ill. 2d 412, 414. In *Alvis* this court, after ruling that probable cause to issue a search warrant appeared from the faces of the affidavit and warrant, said: "It is also contended that the court should have heard evidence to determine the legality of the search warrant. The motion to suppress evidence was based on the illegality of the search warrant. Its legality could be determined by the examination of the affidavit and warrant, and no necessity for the hearing of evidence arose."

Persuasive arguments can be gathered to support either side of the question. The majority of the members of this court prefer the view that the matters declared which caused the search warrant to be issued may not be contested by one subjected to the search.

The fourth amendment to the constitution of the United States and section 6 of article II of the Illinois constitution are practically identical in prohibiting unreasonable searches and seizures and providing that no warrant shall issue without probable cause, supported by affidavit, particularly describing the place to be searched, and the persons or things to be seized. Too, the standards for issuance of warrants are the same for both Federal and State

authorities. *Aguilar* v. *Texas*, 378 U. S. 108, 12 L. Ed. 2d 723, 84 S. Ct. 1509.

This majority of the court believes that both constitutions contemplate only that a judicial officer find probable cause for the issuance of a warrant based on the evidence under oath that has been presented to him by the one requesting the warrant. It is contemplated that the credibility of the affiant or others offering evidence is for the judicial officer. If he finds the evidence worthy of belief and sufficient to form probable cause, this judicial determination cannot be relitigated through a later disputing of the evidence. Should an affiant betray the confidence in his integrity which is contemplated by the *ex parte* proceeding and intentionally make misrepresentations to the judicial officer, he can be punished for the offense. In *People* v. *McGrain*, 38 Ill. 2d 189, 190-191, it was correctly asserted that "the rule [is] that the constitutional guarantee against unreasonable searches and seizures requires that the complaint must state the underlying facts on which the complainant bases his belief with such definiteness that, if the complaint is false, perjury may be assigned upon it." That this and no more are contemplated by the procedure for finding probable cause and issuing search warrants is supported by the expression of the Supreme Court of New Jersey (*State* v. *Burnett*, 42 N. J. 377, 201 A. 2d 39) which the Supreme Court in *McCray* v. *Illinois*, 386 U. S. 300, adopted at p. 307: "The Fourth Amendment is served if a judicial mind passes upon the existence of probable cause. Where the issue is submitted upon an application for a warrant, the magistrate is trusted to evaluate the credibility of the affiant in an ex parte proceeding. As we have said, the magistrate is concerned, not with whether the informant lied, but with whether the affiant is truthful in his recitation of what he was told. If the magistrate doubts the credibility of the affiant, he may require that the informant be

identified or even produced." 386 U. S. 300, 307, 18 L. Ed. 2d 62, 68, 87 S. Ct. 1056.

The view that probable cause for the issuance of a search warrant is to be tested by the evidence originally presented to the judicial officer and that alone is consistent with holdings that the prosecution is precluded from offering supplemental information to sustain a showing of probable cause. The Supreme Court in *Aguilar* v. *Texas*, 378 U. S. 108, 109, 12 L. Ed. 2d 723, 725, n.i. said: "It is elementary that in passing on the validity of a warrant, the reviewing court may consider *only* information brought to the magistrate's attention."

The Supreme Court in *McCray* v. *Illinois*, 386 U. S. 300, recognized the value of informers to law enforcement and assured that their identities under described circumstances need not be disclosed. Were this court to adopt a rule permitting a challenge to the evidence presented to the judicial officer to establish probable cause, it could impair seriously the present protection afforded informers in this area. Cases in which probable cause is established through information provided the affiant officer by an informer are obviously numerous. One can readly suppose contrived situations in which a defendant in these cases, by offering, in a motion to suppress, to contradict or explain what the informer told the police officer, would frame an issue of fact, which could require a hearing and the production of the informer to testify. The alternative would be for the People to drop the prosecutive proceeding. Too, these supposed situations would not be limited to search warrants based on information provided by informers. Where an affiant was deceased, or otherwise unavailable to answer, if required, a challenge to the sworn to matters he originally presented to the judicial officer, a similar problem could appear.

Too, the view permitting a challenge to the matters on which probable cause was found would often, if not typically, result in one judicial officer originally evaluating the credibility of the affiant and another reassessing it in the later motion to suppress. To illustrate, Rule 41(c) of the Federal Rules of Criminal Procedure requires that motions to suppress be brought before a district court, though many, if not most, search warrants are issued by a United States Commissioner. Thus, the district court could be reassessing the matter of credibility already considered by the Commissioner. The majority of this court consider that successive or split evaluations by different judicial officers of the credibility of the affiant and others originally offering evidence were not contemplated in the search warrant procurement procedure.

We do not find merit in the suggestion that there is statutory authority to dispute the matters on which probable cause was found. Section 114—12 of the Code of Criminal Procedure, (Ill. Rev. Stat. 1967, ch. 38, par. 114—12) provides in part that a ground for the suppression of evidence is that "there was not probable cause for the issuance of the warrant" and that "The judge shall receive evidence on any issue of fact necessary to determine the motion." If it was the legislative intent to declare the right for which the defendant here contends it certainly has eluded the understanding of the profession in Illinois. No court to our knowledge has so interpreted the statute. The committee comments to the section do not mention such a right and the law reviews and bar journals appear to be in ignorance of it. A comparison with statutes which grant the right make it evident that our legislature would have used clearly appropriate language to declare the right had this been its intention. For example, the California statute,

quoted in *People* v. *Butler*, 52 Cal. Rptr. 4, 415 P. 2d 819, reads: "If the grounds on which the warrant was issued be controverted, he [the magistrate] must proceed to take testimony in relation thereto, and the testimony of each witness must be reduced to writing and authenticated in the manner prescribed in Section 869." The predecessor (former 18 U. S. C. A. 625) to Rule 41 of the Federal Rules of Criminal Procedure in similar language provided: "If the grounds on which the warrant was issued be controverted, the judge or commissioner must proceed to take testimony in relation thereto, and the testimony of each witness must be reduced to writing and subscribed by each witness." Had our legislature intended to declare the right, we consider it would have done so forthrightly, using comparable language. It would not have attempted to do it through oblique suggestion.

Our statute's language is very similar to that of Rule 41(e) of the Federal Rules of Criminal Procedure, and no clear right appears under Rule 41 to dispute the evidence upon which probable cause was based. *Cf. Rugendorf* v. *United States*, 376 U. S. 528, 11 L. Ed 2d 887, 84 S. Ct. 825; 5 A. L. R. 2d 394, 409.

Thus, our majority declines to adopt a rule which it believes would unnecessarily permit a collateral and distracting evidentiary dispute. Justices Schaefer and Ward consider that the integrity of the judicial process requires that a challenge to evidence be allowed.

The judgments of the circuit court of Cook County are affirmed.

Judgments affirmed.

MR. JUSTICE SCHAEFER dissenting: I dissent for the reasons stated in my dissent to No. 41463, 41464 cons., *People* v. *Mitchell*.

MR. JUSTICE WARD, dissenting:

It is certainly contemplated that testimony or other evidence to be offered in a judicial proceeding shall be truthful, and a finding reflects confidence in and reliance on the evidence. I consider a corollary of this is that if false evidence has been presented it may be exposed, so that an erroneous finding may be set aside. It seems to me that the integrity of the search warrant procedure requires that one who complains that false evidence has been introduced to his detriment should be given an opportunity to show this. To me, a refusal, though well intentioned, to permit such a showing diminishes the judicial process.

The position taken by the majority avoids admittedly troublesome problems, but another consequence is that we sacrifice something of first importance.

MR. JUSTICE SCHAEFER, dissenting:

The fourth amendment to the constitution of the United States provides that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation." Section 6 of article II of the constitution of Illinois contains a similar prohibition. The basic question in these cases is whether those constitutional provisions can be interpreted to mean that the existence of the facts relied upon to establish probable cause cannot be controverted once the warrant has issued. If there can be no subsequent inquiry into the truth of those facts, the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures," is protected only by an unreviewable *ex parte* determination of the lowest officer

in the judicial hierarchy. And that determination may be based upon a hearsay report of the statements of an anonymous informer, which would be inadmissible in any judicial proceeding. I cannot bring myself to believe that this is the "probable cause, supported by Oath" required by the fourth amendment.

One of the difficulties in dealing with this area of the law is that most of the cases with which the courts are concerned involve illegal possession of gambling equipment or narcotics, and the result of the search makes guilt unmistakable. The courts have no way of knowing how many unproductive searches are made upon the basis of false affidavits because those cases do not come before the courts. The constitutional requirement of an oath would seem to imply a remedy, either by civil action or by prejury prosecution, for the victim of a search based upon a false affidavit, but the conclusion of the majority in *McCray v. Illinois* (1967), 386 U. S. 300, 18 L. Ed. 2d 62, 87 S. Ct. 1056, seems to have eliminated any remedy.

In an atmosphere in which there is widespread concern about narcotics problems it is difficult for a court to enforce constitutional guarantees at the instance of one who is unquestionably guilty. But the constitutional provisions are directed at potential abuses by a tyrannical government and those provisions should not, in my opinion, be so diluted in order to secure convictions in narcotics and gambling cases that they can no longer afford protection against the operations of a Hitler type government. It may be that the constitutional protection is phrased in terms that are considered too sweeping to meet the needs of society today. If so, they should be amended. But it is the responsibility of a court to interpret and apply the constitutional provisions as they exist.

The constitutional question involved in these cases was deliberately left open by the Supreme Court of the United States in *Rugendorf* v. *United States* (1964), 376 U. S. 528, 11 L. Ed. 2d 887, 84 S. Ct. 825. The consideration that weighs most heavily in support of the conclusion reached by the majority in these cases is the desire to expedite the disposition of criminal cases. But it is a common characteristic of many constitutional guarantees that they impede the prompt disposition of criminal cases. Indeed, the constitutional privilege against self-incrimination goes further, and interferes with the ascertainment of the truth. The judicial system is resourceful enough to devise procedures which will prevent abuse of the right to challenge the existence of the facts that were relied upon by the issuing officer to establish probable cause. See *People* v. *Alfinito* (1965), 16 N. Y. 2d 181, 211 N. E. 2d 181, 211 N. E. 2d 644; see also A. L. I. Model Code of Pre-Arraignment Procedure, Tent. Draft No. 3, sec. SS 802, and Reporters' Note.

Apart from constitutional considerations, it seems to me that section 114—12 of the Code of Criminal Procedure (Ill. Rev. Stat. 1969, ch. 38, par. 114—12) clearly provides for a hearing at which the existence of the facts that were relied upon by the issuing officer to establish probable cause may be challenged. The statute states:

> "(a) A defendant aggrieved by an unlawful search and seizure may move the court for the return of property and to suppress as evidence anything so obtained on the ground that: * * * (2) The search and seizure with a warrant was illegal because the warrant is insufficient on its face; the evidence seized is not that described in the warrant; *there was not probable cause for the issuance of the warrant;* or, the warrant was illegally executed.
>
> (b) The motion shall be in writing and state facts showing wherein the search and seizure was unlawful.

> *The judge shall receive evidence on any issue of fact necessary to determine the motion* and the burden of proving that the search and seizure were unlawful shall be on the defendant." (Emphasis supplied.)

This statute plainly says that evidence is to be received on the question whether there was probable cause for the issuance of the warrant. Since probable cause initially depended on the facts stated in the affidavit upon which the warrant was issued, the statute must mean that upon a motion to suppress, evidence disputing those facts is to be received.

But even if the statute can somehow be construed to mean that evidence may not be received to show the absence of probable cause, I am of the opinion that the guilt of the defendant, Barbara Mitchell, was not established beyond a reasonable doubt. This case was tried upon a stipulation that guilt or innocence should be determined upon the evidence submitted on the motion to suppress. In my opinion that evidence bars a finding of guilty.

Thirty affidavits that had been used to procure warrants in previous cases were presented to the court. These affidavits were all similar to those used in this case. The officers upon whose affidavits the warrants in the present cases were issued testified that they had prepared a hundred similar affidavits, but that in none of those cases did the informant identify the recipient of the bet. The officers who made the affidavits testified that they did not in any of these cases inquire of the informer where he paid his losses or collected his winnings. This testimony shows a massive indifference on the part of the officers to their duty to suppress gambling; it seems to suggest a conscious effort to avoid implicating any higher-ups in organized gambling. It is not necessary that we attempt to arrive at a precise rationalization of these inherently incredible circumstances;

their existence, in connection with the wholesale use of "boilerplate" affidavits is enough, in my opinion, to show an absence of probable cause. The doubts generated by the extraordinary testimony of the officers are reinforced by the fact that while records of other bets were found when the warrant was executed, there was no record of the bet supposed to have been made by the informer. The defendant, Barbara Mitchell, testified that she had never accepted a bet on a horse race. In my opinion her guilt was not proved beyond a reasonable doubt.

APPENDIX C.

The text of the complaint for the search warrant in the above entitled cause reads, omitting the jurisdiction and signatures, as follows:

Donald Konley, complainant, now appears before the undersigned judge of the Circuit Court of Cook County and requests the issuance of a search warrant to sea[illegible] (the person of John S. Bak and a 1964 Cadillac Coupe bearing Illinois license 1967 984 632 registered to same at 13115 South Western Ave., Blue Island Serial No. of car 64J 086610 and seize the following instruments, articles and things: Papers, books, records, betting slips, devices, machines and any and all other gambling paraphernalia which have been used in the commission of, or which constitute evidence of the offense of Gambling.

Complainant says that he has probable cause to believe based upon the following facts, that the above listed things to be seized are now located upon the person and premises set forth above:

The complainant a member of the Cook County Sheriff's Police Vice Control Unit has received information from an informant who has on previous occasions given this officer and other officers reliable information pertaining to gaming, which in themselves has proven true, exact and accurate to wit; On 1 Feb. '67, the informant gave this complainant information pertaining to a betting establishment at 14911 Park Street, Oak Forest, Illinois which led to the arrest of one subject for gambling; same informant gave information pertaining to a betting establishment on 9 Jan. 1967 at 10122 South Kedvale, Oak Lawn, Illinois that led to the arrest of two subjects for gambling.

On 17 April 1967 said informant furnished this com-

plainant with the address 13115 S. Western Ave., Blue Island, Illinois and related this is the location he goes to when ever he desires to make a wager on horse races. Informant stated this location is a tavern known as "the Pub." Informant stated he enters and leaves the establishment thru the rear door and gives his bets to a woman who sits at a table in the back of the premises. He further stated the book making operation cannot be observed from the tavern area because of a wall of beer cases that hides the table from view from the bar.

On April 17, 1967, thru April 21, 1967 this complainant entered the premises thru the front door and seated himself at the bar in a position where he could observe the back door. On each of these dates this complainant observed a number of persons enter thru the rear door walk behind the wall of beer cases remain a few minutes and then leave thru the rear door. On 20 April 1967, complainant observed a subject seated next to him at the bar reading a racing form and making several notations on small slips of paper. Subject then got up from the bar and walked to the rear of the premises and behind the wall of beer cases. A short time later subject departed thru the rear door.

On 21 April 1967, complainant observed previous mentioned informant enter premises thru the rear door and walk behind the wall of beer cases. A short time later informant departed thru rear door. This complainant left establishment and met with informant on the corner of 131st and Western Ave. Informant stated he had just placed another bet on a horse race with the female in the back section of the tavern. The informant further stated that John Bak was the party who picked up the bets and that the mentioned Cadillac was the car that he uses.

The court ordered $417.00 to be delivered to the Sheriff of Cook County.

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IN THE

Supreme Court of the United States

OCTOBER TERM

No. 304

JOHN S. BAK and A 1964 CADILLAC,

Petitioners,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

(On Petition For Writ Of Certiorari To
The Supreme Court Of Illinois)

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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OPINION BELOW

The opinion of the Supreme Court of Illinois is reported at 45 Ill. 2d 140 (1970).

JURISDICTION

The jurisdictional requisites are adequately set forth in the petition.

CONSTITUTIONAL PROVISIONS

The petitioner relies on Section One of the Fourteenth Amendment to the Constitution of the United States.

QUESTION PRESENTED

Whether a defendant, on a motion to quash a search warrant, is entitled as a constitutional right, to go beyond the four corners of the warrant for purposes of testing the truthfulness of the statements contained within the affidavit.

STATEMENT OF FACTS

On April 25, 1967, Officer Donald Konley, a member of the Sheriff's Police Vice Control Unit, Cook County, Illinois, appeared before the Honorable John F. Reynolds, a Judge of the Circuit Court of Cook County, Illinois, and filed a complaint for a search warrant, the text of which is set out in Appendix C of Petitioner's Brief for Certiorari at A31-2.

Judge Reynolds issued the search warrant and later the same day the warrant was executed by Officer Konley. The petitioner, John S. Bak was stopped in his 1964 Cadillac automobile by Officer Konley, and served with a copy of the warrant. Officer Konley then searched Bak's automobile under the authority of the warrant. The search revealed bet slips and racing forms which were seized by Officer Konley.

In his subsequent trial for gambling (Case No. 41151) the petitioner was found guilty and fined $250.00. Shortly thereafter Bak's automobile was declared forfeited in accordance with the provisions of Ch. 38, Art. 36, of the Illinois Criminal Code of 1961 (Case No. 41315).

In both cases, petitioner moved to quash the search warrant and suppress the evidence. At the hearings on the motions, in the words of the Supreme Court of Illinois, the petitioner:

> "offered to prove that on the two instances cited in the affidavit in support of the reliability of the informer arrests resulted but no convictions; that the affidavit had misrepresented the physical appearance of the tavern, which misrepresentations could be proved by photographs and witnesses; that there was no rear room to the tavern but there was another entrance to the tavern from another street, which entrance was not visible from the part of the bar from which the affiant had made his observations; that the informer never had any contact with the defendant or his car; and, finally, that the only paragraph mentioning the defendant was the last one in the complaint, which obviously had been typed on a different typewriter, and which may have been added after the execution of the search warrant!" 45 Ill. 2d at 141-42.

In both cases the courts rejected petitioner's offer on the ground that the purpose of the hearing was not to test the veracity of the statements made in the affidavit but, rather, to determine whether the Magistrate had probable cause, based on the face of the complaint, to issue the search warrant. The Supreme Court of Illinois, on rehearing, affirmed the judgments of the lower courts.

REASONS FOR DENYING THE WRIT

ON A MOTION TO QUASH A SEARCH WARRANT, A DEFENDANT DOES NOT HAVE A CONSTITUTIONAL RIGHT TO GO BEYOND THE FOUR CORNERS OF THE WARRANT FOR THE PURPOSE OF CONTROVERTING THE MATTERS CONTAINED WITHIN THE AFFIDAVIT.

In the proceedings below, on a motion to suppress and again at trial, the petitioner sought to show that no probable cause existed for the issuance of a search warrant because the informer was not reliable and allegations made by the affiant-police officer were false. The trial court held that petitioner could not inquire behind the affidavit and search warrant since, on their face, probable cause existed. The Supreme Court of Illinois affirmed the decision of the trial court, *People* v. *Bak*, 45 Ill. 2d 140 (1970). The People submit that the decision of the Supreme Court of Illinois was correct.

A.

TO PERMIT A DEFENDANT TO GO BEYOND THE FOUR CORNERS OF THE WARRANT IS INCONSISTENT WITH McCRAY v. ILLINOIS.

The People contend that when a law enforcement officer submits his proposed search and the grounds therefor to prior judicial review, then the only issue before the trial court on a motion to suppress is the legal sufficiency of the affidavit's allegations. On the other hand when a search is conducted without prior judicial approval then the trial court may fully review both the factual and legal basis of the search. This view of the differing scope

of inquiry on a motion to suppress in warrant and non-warrant cases is supported fully by *McCray* v. *Illinois*, 386 U.S. 300 (1967), decided subsequent to *Rugendorf* v. *United States*, 376 U.S. 528 (1964):

> In *McCray*, this Court adopted an opinion of the Supreme Court of New Jersey [*State* v. *Burnett*, 42 N.J. 377, 385-88, 201 A. 2d 39, 43-45 (1964)] stating:
>
> "The Fourth Amendment is served if a judicial mind passes upon the existence of probable cause. Where the issue is submitted upon an application for a warrant, the magistrate is trusted to evaluate the credibility of the affiant in an ex parte proceeding. As we have said, the magistrate is concerned, not with whether the informant lied, but with whether the affiant is truthful in his recitation of what he was told. If the magistrate doubts the credibility of the affiant, he may require that the informant be identified or even produced. It seems to us that the same approach is equally sufficient where the search was without a warrant, that is to say, that it should rest entirely with the judge who hears the motion to suppress, to decide whether he needs such disclosure as to the informant in order to decide whether the officer is a believable witness." (386 U.S. 300, 306-308).

This opinion could not be more clear. "The magistrate is trusted to evaluate the credibility of the affiant in an ex parte proceeding." There is no reason for reviewing Courts to have less confidence in the magistrates of Illinois than this Court displayed in *McCray*.

As this Court has stated: "A grudging or negative attitude by reviewing courts toward warrants will tend to discourage police officers from submitting their evidence to a judicial officer before acting." *United States* v. *Ventresca*, 380 U.S. 102, 108 (1965).

B.

TO PERMIT A DEFENDANT TO GO BEYOND THE FOUR CORNERS OF THE WARRANT WOULD RENDER MEANINGLESS THE CONCEPT OF PRIOR JUDICIAL REVIEW OF PROBABLE CAUSE.

The petitioner does not answer, (or even attempt to answer) the most nagging question presented by his contentions. If the defendant is free to attack the credibility judgment of the court issuing the search warrant, what end is served by securing a warrant in the first place? What is the purpose of the warrant procedure?

The simple truth is that if a search upon a legally sufficient warrant is subject to the same scope of attack on a motion to suppress as a search without a warrant, then the act of the police in securing the warrant and the act of the court in issuing it are both pointless.

The inability to assign a meaningful role to the judgment of an issuing judge or magistrate under a rule which makes no distinction between motions to suppress on warrant and non-warrant cases has caused an overwhelming majority of courts to reject the rule defendant advocates.

The petitioner argues that he can prove that the allegations in the complaint are untrue. Assuming this is the case, there is little justification for allowing such proof in a motion to suppress real evidence. The admission of illegally seized evidence does not affect the integrity of the process of guilt determination. There is, of course, a significant constitutional and practical difference between alleged errors which affect the reliability of the guilt determining process and those which do not.

Linkletter v. *Walker*, 381 U.S. 618, 629 (1965). *Desist* v. *United States*, 394 U.S. 244 249-30 (1969). *McCray* v. *Illinois*, 386 U.S. 300, 306-07. Any possible error of the magistrate in issuing a warrant does not affect the reliability or legitimacy of the evidence seized: Further, the submission of an affidavit to a neutral, detached magistrate, whose judgment as to legal sufficiency is subject to review, would serve the purposes envisioned by the promulgation of the exclusionary rule.

C.

A MAJORITY OF JURISDICTIONS DO NOT PERMIT A DEFENDANT TO GO BEYOND THE FOUR CORNERS OF THE WARRANT.

The leading State case on the issue is *Smith* v. *State*, 191 Md. 329, 335; 62 A. 2d 287, 289 (1948) *cert. denied*, 336 U.S. 925 where the court held:

> "The better rule seems to be that the Court's consideration of the showing of probable cause should be confined solely to the affidavit itself, and the truth of the alleged grounds stated in the affidavit cannot be controverted . . . by receiving the testimony of the accused and other witnesses."

The Court of Appeals of Maryland has adhered to this rule despite numerous attacks. See *Tucker* v. *State*, 244 Md. 488, 224 A. 2d 111 (1966) (reviewing recent cases of the United States Supreme Court) *cert.* denied, 386 U.S. 1024; and *State* v. *Scarborough*, 238 A. 2d 297 (Md. App. 1968).

The Oklahoma Court of Criminal Appeals has reached a similar result using similar language, *State* v. *Edwards*, 311 P. 2d 266, 269 (1957); *Gaddis* v. *State*, 447 P. 2d 42, 45 (Okla. Crim. 1968); *Phillips* v. *State*, 244 Pac. 451

(Okla. Crim. 1926). Texas has held that "It is well settled that a trial court may not go behind the affidavit for a search warrant to determine the falsity of the facts stated therein in order to invalidate a search warrant valid upon its face." *Griffey* v. *State*, 327 S.W. 2d 585, 587 (Tex. Crim. 1959); *Jackson* v. *State*, 365 S.W. 2d 935, 938 (Tex. Crim. 1963).

The Supreme Court of Arkansas has recently held similarly: "The general rule is that, in the absence of a statute, a subsequent showing of the falsity of an affidavit for search warrant cannot retrospectively invalidate a warrant valid when it was issued. *Liberto* v. *State*, 541 S.W. 2d 464, 468 (Ark. 1970).

In Annotation, 5 A.L.R. 2d 394, 396 it is stated that "a large majority of the cases deciding the question apart from governing statutory provisions take the position that one against who a search warrant is issued may not dispute the matters alleged in the affidavit or verified complaint supporting the warrant . . . [There] are a large number of decisions—which represent an overwhelming majority of those cases decided apart from applicable statutes—supporting the view that the matters contained in an affidavit or verified complaint on which a search warrant is based may not be questioned or disputed by the person against whom the warrant is directed." See *Bowen* v. *Commonwealth*, 251 S.W. 625 (Ky. 1923); *State* v. *Stevens*, 292 S.W. 36 (Mo. 1927).

The rationale of this rule is stated in *Owens* v. *State*, 399 S.W. 2d 507, 511 (Tenn. 1966):

> "It is clear, then, that the facts stated in the affidavit, i.e., the facts upon which the affiant bases his reasonable belief, are not subject to contradiction at trial for the purpose of suppressing the evidence secured by means of the warrant. This is so because

> the magistrate determines the verity of the facts, at least he is supposed to, before he issues the warrant."

See also *Gallimore* v. *State*, 116 S.W. 2d 1001 (Tenn. 1938).

The Circuit Court of Appeals for the District of Columbia has held that, "It is sufficient that the affidavit showed probable cause at the time the warrant was issued." *Kenney* v. *United States*, 157 F. 2d 442 (D.C. Cir. 1946). The rule was followed and other federal precedents were discussed by Judge Holtzhoff in *United States* v. *Gianaris*, 25 F.R.D. 194 (D.D.C. 1960); See also, *United States* v. *Brunett*, 53 F. 2d 219 (W.D. Mo. 1931); *United States* v. *Bowling*, 351 F. 2d 236, 242n.2 (6th Cir. 1965).

Petitioner seemingly suggests that the above decisions have been abrogated by *Mapp* v. *Ohio*, 367 U.S. 643 (Petitioner's Br. p. 6); however, no less than six (6) state decisions, aside from the instant case, have post-dated *Mapp* and support the Peoples view. Also in *Rugendof* v. *United States*, *supra*, a post *Mapp* decision, this Court stated that the issue here presented has not been decided. It was, however, implicitly decided against petitioner in *McCray*.

D.

A DEFENDANT SHOULD NOT BE PERMITTED TO CHALLENGE A PRIOR JUDICIAL DETERMINATION OF PROBABLE CAUSE WITHOUT PRESENTING SUBSTANTIAL JUSTIFICATION FOR SUCH A CHALLENGE—MORE THAN A MERE CREDIBILITY CONTEST BETWEEN DEFENDANT'S WITNESSES AND THE AFFIANT.

Even if a defendant is allowed to challenge the truthfulness of an affidavit the Courts should require that a

defendant present more than the prospect of a credibility contest between the affiant and the defendant's witnesses.

If a credibility contest is sufficient cause to allow the truthfulness of an affidavit to be challenged, then every affidavit will be challenged and the dire results the People fear will inevitably occur.

In the alternative, the People suggest that a defendant be precluded from challenging the truth of an affidavit for a warrant on the basis of oral testimony which merely contradicts the allegations of the warrant as was presented in the instant case.[1]

The affiant stated in his affidavit that he observed certain persons enter through a rear door of the tavern and walk behind a partition made of piled up beer cases in which area the bets were taken. The petitioner states that by pictures and testimony he could show that the affiant could not have observed what he alleged because of the physical layout of the tavern. It goes without saying that the interior of the tavern as described by the officer was readily subject to change. It further goes without saying that the defendant and others interested in the tavern

1. The instant petitioner could not show factually that the affiant in this case was not telling the issuing magistrate the truth as was pointed out in the opinion of the Supreme Court of Illinois, 45 Ill. 2d at 41-42, petitioner alleged that he could show that the information supplied by the informant to the officer in the past had not lead to a conviction, and that the interior of the tavern was not as described by the officer. But the affiant specifically stated that he based his reliance on the informant on past information which had lead to arrests and never told the judge that convictions had flowed from these (affidavit set out at page 31 of petitioner's brief).

would have strong reasons for wanting its condition changed. Photographs of the interior of the tavern would not prove that the physical layout of the tavern was other than stated by the affiant at the time he was present in the tavern, they would prove at most that the affiant's observations, due to the physical layout, are not possible at the present time.

The Court should require the production of concrete evidence showing beyond reasonable dispute that the allegations are materially false.[2]

Further, this Court should require that the defendant and the witnesses who support him be compelled to testify subject to cross-examination and to introduce all physical evidence prior to requiring a hearing on the truth of the affidavit's allegations.

This procedure will not prejudice defendant whose testimony on the motion is inadmissible at trial. *Simmons v. United States*, 390 U.S. 377 (1968). But the procedure will give a trial judge a concrete basis on which to determine whether the attack on the affidavit is well taken and substantial. It will also prevent a defendant from forcing the prosecution to dismiss a charge to protect an

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2. E.g. A defendant may be able to prove with witnesses of indisputable reliability and with plane tickets, hotel and restaurant receipts that on the day the informer says he bought narcotics from him the defendant was in Los Angeles. Or a defendant may prove that the building in which the informer said he purchased narcotics from defendant was torn down years before. In neither of these two situations would this proof be conclusive since the informer may have innocently erred as to date or address but such proof at least presents a reasonable basis for inquiring into the truth of the affidavit.

informer merely on the basis of unsworn pleadings and nebulous offers of proof. Finally, such a rule will limit the exercise of the trial court's power to disregard a prior judicial determination of probable cause and redetermine the issue to those cases in which it is absolutely necessary to do so.

CONCLUSION

The People of the State of Illinois ask this Court to deny the petition for certiorari because there is no constitutional requirement that a defendant be allowed to challenge a prior judicial determination that there is probable cause for a search, or, in the alternative, because petitioner has failed to produce more than a mere swearing contest between his witnesses and the affiant.

Respectfully submitted,

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